***United States Court of Appeals***

***for the Second Circuit***


# APPELLEE'S BRIEF

# 75-1293

*To be argued by*
LAWRENCE B. PEDOWITZ

# United States Court of Appeals

## FOR THE SECOND CIRCUIT

**Docket No. 75-1293**

UNITED STATES OF AMERICA,
*Appellee,*

—v.—

JOHN LYNCH and KENNETH McNALLY,
*Defendants-Appellants.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

## BRIEF FOR THE UNITED STATES OF AMERICA


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## BRIEF FOR THE UNITED STATES OF AMERICA

### Preliminary Statement

John Lynch and Kenneth McNally appeal from judgments of conviction entered on May 6, 1975, after a three day trial before the Honorable Lloyd F. MacMahon, United States District Judge, and a jury.

Indictment 75 Cr. 314,* filed March 26, 1975, charged Lynch and McNally in Count One with stealing goods and chattels which had been moving as part of an interstate shipment of freight and express. Title 18, United States Code, Sections 659 and 2. Count Two charged Lynch with carrying a firearm while committing the offense charged in Count One. Title 18, United States Code, Sections

* Indictment 75 Cr. 314 superseded Indictment 75 Cr. 196.

921(a)(2), (3) and 924(c). Count Three charged Lynch and McNally with stealing goods and chattels which had been moving as part of an interstate shipment of freight and express. Title 18, United States Code, Sections 659 and 2. Count Four charged Lynch with carrying a firearm during the offense charged in Count Three. Title 18, United States Code, Sections 921(a)(2), (3) and 924(c).

Trial commenced on April 1, 1975 and concluded on April 3, 1975, when the jury found Lynch guilty on each count and McNally guilty on Count One and not guilty on Count Three.

On May 6, 1975, Judge MacMahon sentenced Lynch to concurrent terms of eight years' imprisonment on Counts One through Four. McNally was sentenced to a term of imprisonment of six years on Count One.

Both Lynch and McNally are incarcerated pending this appeal.

## Statement of Facts

### The Government's Case

On June 26, 1974, at approximately 11 P.M., Gary Andrews, a truck driver, stopped his truck at a red light on the corner of Hunts Point Avenue and Bruckner Boulevard in the Bronx. The truck, loaded with about 40,000 pounds of meat valued at approximately $40,000, was on its way to make deliveries in Connecticut, Rhode Island and Massachusetts. While waiting at the traffic light, Andrews heard a tapping on the window and turned toward the passenger side of the truck. There he saw John Lynch standing, gun drawn, and heard Lynch order that the truck door be opened. Andrews then awoke

Albert Fillmore, who was his co-driver and had been resting in the sleeping compartment, and told him to open the door. Fillmore did as instructed, and Lynch entered the truck. He then advised the drivers that they were being hijacked, told Fillmore to keep his head down or he would blow it off, and put his revolver to Fillmore's face and neck. Lynch then instructed Andrews to follow a yellow Cadillac which was just ahead of the truck. Andrews drove for about three or four blocks, whereupon he was told to stop the truck. Lynch then ordered Andrews to release the truck's brakes, wait in the truck while he led Fillmore to a nearby corner, and then follow as soon as he and Fillmore reached the corner. Andrews followed these instructions, and he and Fillmore were then led to the back seat of the yellow Cadillac where both men were told to put their heads between their legs. Lynch got into the passenger side of the Cadillac, which was driven by Kenneth McNally. (Tr. 24-33, 72, 175-78).

McNally and Lynch drove the two drivers around the New York City area for about an hour and a half. The car was then stopped so that Lynch could pick up some beer which was shared with Andrews and Fillmore. About an hour later, the Cadillac was stopped so that Andrews could use the bathroom of a bar. Lynch led Andrews at gunpoint to the restroom. As Lynch and Andrews were leaving the bar, Lynch stopped to make a phone call. He then told Andrews to come to the phone and explain to the person on the other end how to move the truck. (Tr. 34-36, 179).

After the phone call was completed, Lynch returned Andrews to the Cadillac and told the two drivers that, since the car was stolen and he was concerned that the police might stop the car, the drivers were going to be led into the bar. The drivers, warned not to try anything, were then taken into the bar. Lynch sat with the

two drivers in a booth, his gun pointed at them under the table, while McNally sat at the bar. (Tr. 36-37, 180).

After an hour or two, the two men were told to get back into the Cadillac. The car was then driven around until it was stopped for Lynch to make another phone call. Lynch made the call, returned, and angrily told the drivers that he wanted the keys to their truck and that, if he did not get them, he would blow their heads off. Fillmore handed Lynch the keys. (Tr. 38-40, 180-81).

The drivers were then driven around for a short period of time, whereupon Lynch got out of the car and another, unknown, male entered. McNally then drove Andrews and Fillmore to the Lincoln Center subway station, where the drivers' names and addresses were taken and they were told to go down into the station and not to return. The drivers' release came some eight hours after they had been hijacked. In the late afternoon of June 27, 1974, their truck was found emptied of its cargo.* (Tr. 39-42, 83, 181-82).

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* On August 5, 1974, Albert Fillmore incorrectly identified a picture of Kono Santoro from the FBI photographic files as the man who had initially hijacked the truck at gunpoint on June 26, 1974. Two weeks later, just North of the New Rochelle toll station on Interstate 95, John Lynch unsuccessfully attempted to hijack Fillmore at gunpoint a second time. Having seen Lynch this second time, Fillmore voluntarily returned to FBI headquarters where he repudiated his identification of Santuro and selected a picture of Lynch from among some 500 FBI photographs. (Tr. 183-86).

On October 30, 1974, at FBI lineups with defense counsel in attendance, both Andrews and Fillmore separately identified McNally as the driver of the Cadillac. (Tr. 33-34, 190). On November 12, 1974, again with defense counsel present, both drivers selected Lynch at FBI lineups as the man who had initially hijacked their truck. (Tr. 28-29, 188-89). At trial, the drivers readily made in-court identifications of both Lynch and McNally. (Tr. 27, 33, 176, 178-79).

On the afternoon of September 6, 1974 in New York City, Luther Thomas, a driver, and Edward Jermott, his helper, completed the loading of approximately $30,000 of meat onto a truck bound for Elizabeth, New Jersey. Shortly after beginning on their interstate journey, Thomas stopped at a red light on 34th Street and Ninth Avenue. John Lynch, gun in hand, opened the door of the truck and told Thomas and Jermott that he was holding a .38 on them. Lynch ordered Thomas to drive to Tenth Avenue and pull over. After waiting at that location for a period of time, Lynch told the men to drive through the Lincoln Tunnel, get onto the New Jersey Turnpike, and pull into the first service area. Lynch, unable to make a phone call because Thomas could not maneuver the truck close enough to a booth, instructed Thomas to drive to the next service area. There, Lynch took Jermott out of the truck at gunpoint and made a phone call. Lynch then returned Jermott to the truck and told Thomas to again drive to the first service area. Upon returning to that service area, Lynch took Jermott to make another call. When Lynch returned with Jermott, he first ordered the men out of the truck to stretch, then took Jermott to get coffee, and finally made another call. (Tr. 86-99, 138-50).

While Lynch was at the phone booth with Jermott making this last call, a red Chevrolet Nova drove into the service area. Two men got out of the chevy and Jermott was taken to the car and put in the back seat. Lynch then brought one of the recent arrivals over to the truck and told Thomas to explain to him how the brakes of the truck were released. Lynch then took Thomas back to the red chevy, put him in the back seat with Jermott,

and got into the passenger side of the front seat with the driver.* (Tr. 99-101, 150-51).

Thomas and Jermott were then driven around for a number of hours during which the car was stopped to get beer for Lynch and the car's driver as well as some vodka for Thomas and Jermott. Shortly thereafter, at a motor lodge just off the New Jersey Turnpike, Lynch got out of the chevy. The driver, now alone, then drove Thomas and Jermott to the Union Square subway station where he told the men to go into the station and not to look back. The release of the men came almost eleven hours after they had initially been hijacked. On September 7, 1974, the truck was found in New Jersey without its cargo.** (Tr. 104-38, 156-58, 174).

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* Although McNally was acquitted on Count Three, the following testimony linked him to the events of September 6, 1974: Thomas testified that McNally looked like the man who drove the chevy (Tr. 101), and Thomas further identified a picture of McNally from a photographic spread as looking like the driver. (Tr. 102). Jermott also selected a picture of McNally from the same spread and said it appeared to be the driver. Jermott also testified that, while he had not at the time admitted to seeing the driver at a November 11, 1974 FBI lineup, he had in fact seen him. Shown a picture of the lineup, Jermott selected McNally as the driver. (Tr. 151-56).

McNally was exculpated at trial by Thomas' admission that he had been unable to identify the driver in the November 11, 1974 lineup, though McNally was a participant, and by Jermott's inability to identify the driver of the chevy in the courtroom, though McNally was present. (Tr. 104, 151-52).

** At a November 12, 1974 lineup, Thomas identified John Lynch as the man who had initially hijacked his truck. (Tr. 92). On that same date, Jermott, after viewing a lineup containing Lynch, stated that he could not identify anyone. (Tr. 142, 153). At trial Jermott stated that he had in fact recognized Lynch at the lineup, but had not told this to the FBI. Both Thomas and Jermott made in-court identifications of Lynch as the man who hijacked them with a weapon. (Tr. 91-92).

## The Defense Case

Kenneth McNally took the stand. He admitted being a close friend of John Lynch's since childhood but denied participating in a hijacking on either June 26, 1974 or September 6, 1974. He claimed that on June 26, 1974, he was at a restaurant until midnight and then went to a birthday party which lasted until the early morning hours of June 27. He also claimed that on September 6, 1974 he was at work from 7 A.M. until 6 P.M. (Tr. 251-60).

On cross-examination, McNally stated that, at the birthday party on June 27, 1974, he had seen Grace Seviro, her husband Frank and Anna Turtora. None of these persons were called as defense witnesses. Also during cross-examination, McNally stated that, while it was Grace Seviro's birthday party he had gone to on June 26, 1974, June 26th was not the actual date of her birth. He was unable to recollect how he remembered that the party had taken place on June 26, 1974 and admitted he had not attempted to confirm this fact with anyone with whom he had allegedly spent time on June 26 and 27, 1974. (Tr. 264-95).

The defense also called Gerald Collins, an agent of the FBI, who testified that, although Edward Jermott had seen lineups on November 12, 1974 containing Lynch and McNally, he had told him on the date that he was unable to identify anyone.* (Tr. 301-02).

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* Jermott testified during the Government's case that, while he had not identified anyone on November 12, 1974, he had in fact seen the two men who hijacked him, men whom he identified at trial from photographs of the November 12, 1974 lineups as John Lynch and Kenneth McNally. (Tr. 142-43, 153). The trial judge would not permit Jermott to explain why he had not identified Lynch and McNally at the lineups. (Tr. 142, 153-54).

## ARGUMENT

### POINT I

**Appellants Were Not Deprived of the Effective Assistance of Counsel As a Result of Joint Representation.**

Lynch and McNally claim that their joint representation by a retained attorney deprived them of effective assistance of counsel and that, in any event, the District Court should have held a full-scale evidentiary hearing to determine whether they knowingly consented to, and understood the implications of, joint representation. This claim is without merit.

It is well-settled that a defendant is entitled to the "untrammeled and unimpaired" assistance of counsel for his defense. *Glasser* v. *United States*, 315 U.S. 60, 70 (1942). But representation of co-defendants by the same attorney is not tantamount to a denial of the effective assistance of counsel guaranteed by the Sixth Amendment:

> "The rule in this circuit is that some specific instance of prejudice, some real conflict of interest, resulting from a joint representation must be shown to exist before it can be said that an appellant has been denied the effective assistance of counsel."

*United States* v. *Lovano*, 420 F.2d 769, 773 (2d Cir.), *cert. denied*, 397 U.S. 1071 (1970); *United States* v. *DeBerry*, 487 F.2d 448, 452 (2d Cir. 1973); *United States* v. *Wisniewski*, 478 F.2d 274, 281 (2d Cir. 1973); *United States* v. *Alberti*, 470 F.2d 878, 881 (2d Cir. 1972), *cert. denied*, 411 U.S. 919 (1973); see *United States* v. *Goldberg*, 401 F.2d 644, 648 (2d Cir. 1968), *cert. denied*, 393

U.S. 1099 (1969); *United States* v. *Paz-Sierra*, 367 F.2d 930, 932-33 (2d Cir. 1966), *cert. denied*, 386 U.S. 935 (1967); *United States* v. *Armone*, 363 F.2d 385, 406 (2d Cir. 1966), *cert. denied sub nom. Viscardi* v. *United States*, 385 U.S. 957 (1966); *United States* v. *Dardi*, 330 F.2d 316, 335 (2d Cir.), *cert. denied*, 379 U.S. 845 (1964); *United States* v. *Bentvena*, 319 F.2d 916, 937 (2d Cir.), *cert. denied sub nom. Ormento* v. *United States*, 375 U.S. 940 (1963), and cases cited therein. Mere speculation, conjecture, or surmise concerning prejudice or a conflict of interest will not support an attack on effective assistance of counsel.* For "[t]o permit a *post hoc* judicial inquiry into earlier privileged attorney-client communications whenever a defendant seeks to set aside his conviction on grounds of conflict of interest on the part of his lawyer would be virtually to outlaw joint representation, since the temptation to attack his counsel's unsuccessful strategy would be too great for the disappointed client to resist, particularly when he stood to lose nothing by launching the attack." *United States* v. *Wisniewski*, *supra*, 478 F.2d at 285.

The claims made by Lynch and McNally for the first time on this appeal fall far short of demonstrating this required concrete prejudice or geniune conflict of interest. Appellants instead strain to reverse their well-merited convictions by advancing utterly fanciful and conjectural arguments.

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* In addition to those Second Circuit cases cited above, the following are examples of decisions of other circuits which support the view that speculative assertions of prejudice are insufficient to launch an attack on effective assistance of counsel: *United States* v. *Rispo*, 470 F.2d 1099, 1102-03 (3d Cir. 1973); *United States* v. *Gallagher*, 437 F.2d 1191, 1194 (7th Cir.), *cert. denied*, 402 U.S. 1009 (1971); *Fields* v. *United States*, 408 F.2d 885, 887 (5th Cir. 1969); *Lugo* v. *United States*, 350 F.2d 858, 859 (9th Cir. 1965).

In support of their claim of ineffective assistance of counsel, appellants refer first to defense counsel's statement in the robing room that he did not intend to "pull anything" in the summation. (Appellants' Brief at 12, 15). Construing their counsel's remark to mean that he was unwilling to go the full limit in summation, appellants contend that the remark demonstrates that the defense attorney did not have each of his clients' true and complete interests at heart.

The strained interpretation lent to trial counsel's statement utterly distorts the record. Just prior to making this statement, counsel had advised the court that he saw no conflict in the joint representation of Lynch and McNally. (Tr. 307-08). He observed that McNally's testimony in his own defense had created no conflict, indeed supported Lynch and McNally's common defense that they both had been incorrectly identified as hijackers. (Tr. 308). He then said, "I am not going to pull anything in the summation, that's for sure, about him creating any conflict. I don't see it." The trial judge then agreed that he had not been a witness to any conflict. (Tr. 308). In this context, defense counsel's statement that he would not "pull anything" was manifestly nothing more than an assurance that he did not believe McNally's testimony had in any way conflicted with their common defense and that he did not intend to allege a conflict where none existed. (See Tr. 308).

Appellants conjure up a variety of additional claims of prejudice. They suggest that an attorney for Lynch might have cross-examined McNally. (Appellants' Brief at 16). However, they are unable to even speculate at what such a cross-examination might have been directed, particularly since McNally had testified that on June 26, 1974, the date of the first hijacking, he was at a party



with friends and that on September 6, 1974, the date of the second hijacking, he was at work, all of which supported Lynch's defense that both he and his codefendant had been incorrectly identified as participants in the hijacking. *Cf. United States* v. *Sheiner*, 410 F.2d 337, 343 (2d Cir.), *cert. denied*, 396 U.S. 825 (1969). Speculation runs rampant when appellants suggest that if McNally had his own attorney he *might* have called Lynch as a witness and Lynch *might*, "if Lynch could be truthful," have exculpated McNally without prejudicing his own case. (Appellants' Brief at 16). *Cf. Fields* v. *United States*, 408 F.2d 885 (5th Cir. 1969). One wonders why, if Lynch could have exculpated McNally without prejudicing his own case, an attorney representing the men jointly would not have called Lynch to the stand, and therefore how a failure to put Lynch on the stand can be attributed to joint representation. But in any event the courts will not, in the absence of concrete assurances concerning how a witness would testify, accept the musings of a defendant about the possible testimony of uncalled witnesses. See *United States* v. *Wisniewski*, *supra*, 478 F.2d at 284; *United States* v. *Pinc*, 452 F.2d 507, 509 (5th Cir. 1971); *United States* v. *Armone*, *supra*, 363 F.2d at 406. And equally spurious is the claim that the jury might have inferred from Lynch's failure to testify that he was reluctant to testify because, if he had taken the stand, he might have implicated his close friend McNally. Aside from the illogical and speculative nature of this claim, it is clear that, if the jury had been inclined to draw such an inference despite Judge MacMahon's express instructions to the contrary (Tr. 368), the inference would have arisen not from appellants' joint representa-

tion but rather from their joint trial. Individual representation would have made no difference.*

Finally, it is claimed that, if the defendants had been separately represented, there would have been separate and unrestrained summations for each of them. Aside from the tautilogical observation that two lawyers would likely have led to two summations, appellants make only a single concrete claim that the able defense summation given in this case was infected by a conflict of interest. They assert that defense counsel noted in his summation that McNally had voluntarily taken the stand, and this (although not fully articulated in appellants' brief) was likely detrimental to Lynch who had not taken the stand. But unexplained is how appellants could expect this "prejudice" to have dissipated if they had retained separate attorneys. For Lynch, who had two prior convictions, was a highly unlikely candidate for the stand whether jointly or separately represented.** In that circumstance at a joint trial with separate attorneys, Lynch would most certainly have continued to suffer the same "prejudice," that is, his codefendant would have taken the

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* Appellants also claim that, when the prosecutor referred in summation to the fact that Lynch and McNally were "close friends," he all but added that they "were so close that they shared an attorney." (Brief at 15). First, while it is argued that the prosecutor all but said this, he did not. Second, the prosecutor did not have to rely on the defendants' joint representation to establish their friendship. When McNally took the stand, he testified that he had been a friend of Lynch's since childhood (Tr. 251-53), and the Government had earlier introduced records of telephone calls between the defendants' households. (Tr. 172-74).

** Lynch had previously been convicted of possessing a firearm while in a van at Kennedy Airport. At time of his arrest, there were other men inside the van, together with masks and burglar's tools. Lynch also had a prior conviction for attempting to bribe a New Jersey Police Officer. (Tr. 397-98).

stand, while he would not, and his codefendant's attorney would have then drawn attention to the fact that McNally had voluntarily taken the stand.*

Decisions in other Circuits clearly demonstrate the infirmity in this claim of prejudice. In *United States* v. *Rispo*, 470 F.2d 1099 (3d Cir. 1973), two defendants were jointly represented at trial. On appeal, one of the defendants claimed that he had only taken the stand at trial and subjected himself to impeachment by a prior conviction because his co-defendant had decided to call character witnesses and he felt obliged to do likewise so as not to suffer by comparison. Since character witnesses could be cross-examined about their knowledge of the defendant's prior conviction, the defendant apparently decided he might as well take the stand. The Third Circuit rejected the constitutional claim, finding that the defendant

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* Subsumed in appellants' claim and unarticulated may be the assertion that, when two defendants are jointly represented and only one defendant takes the stand, the defendant who remains mute suffers more by comparison in the eyes of the jury than he would if he had a separate attorney. In support of this contention, there are, to be sure, dicta in this Court's decisions in *United States* v. *DeBerry*, *supra*, 487 F.2d at 453, and *Morgan* v. *United States*, 396 F.2d 110, 114 (2d Cir. 1968), to the effect that prejudice is likely to result when two defendants are jointly represented and only one takes the stand. However, these observations in *DeBerry* and *Morgan* must be taken in the context in which they were uttered. In both of those cases, a defendant had taken the stand and by his own testimony incriminated his co-defendant. Here, in contrast, McNally's alibi defense, if believed, would surely have gone a long way toward discrediting the drivers' and helpers' identification of both appellants. Moreover, the jury was instructed that it was to infer nothing from Lynch's failure to take the stand. To conclude that Lynch suffered "more" by comparison because of joint representation surely presumes that the jury, in blatant disregard of its charge, inferred a degree of guilt from Lynch's failure to take the stand.

had failed to explain how separate counsel would have dispelled the "prejudice" resulting from his failure to call character witnesses if his co-defendant were to do so. The court concluded that the defendant had failed to show that he suffered prejudice as a result of joint representation. Similarly, in *United States* v. *Jones*, 436 F.2d 971 (6th Cir. 1971), a defendant whose wife was jointly represented with him at trial claimed that, if represented by separate counsel, he would not have taken the stand, inculpated himself, and then tried to exculpate his wife. The Court of Appeals, finding the Government's case against the husband overwhelming, concluded that, because of the strength of the Government's case, there was no reason to believe that the husband would have behaved differently if he had had separate counsel. The husband's claim of prejudice was therefore rejected. See also *Fryar* v. *United States*, 404 F.2d 1071 (10th Cir. 1968), *cert. denied*, 395 U.S. 964 (1969).

In the instant case, as in *Rispo* and *Jones*, Lynch has failed to show why it should be expected that, if he had been separately represented, he would have taken the stand. In that circumstance, no "prejudice" can be attributed to joint representation.* *Cf. United States* v. *Alberti*, *supra*, 470 F.2d at 881.

Appellants also assert that, regardless of any showing of prejudice or conflict, the trial judge was obliged to conduct an full-scale evidentiary hearing to ascertain

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* If this Court should disagree with the Government's conclusion that Lynch has failed to show that he suffered any prejudice as a result of joint representation, this would not affect the validity of McNally's conviction unless he also demonstrated that he had suffered some detriment. See *Glasser* v. *United States*, *supra*, 315 U.S. at 76-77.

whether the defendants knowingly agreed to joint representation. This argument is premised on the unsupportable position that every time a defendant allows himself to be jointly represented he is waiving his constitutional right to effective assistance of counsel and therefore a hearing is necessary to determine whether the waiver is knowledgeable. (See Appellants' Brief at 13). What appellants overlook is that this Circuit does not presume that a Sixth Amendment violation automatically results from joint presentation. It is for this reason that a hearing is mandated only when, and if, the trial court becomes aware of the existence of potential prejudice or a conflict. See *Glasser* v. *United States*, *supra*, 315 U.S. at 71, 76; *United States* v. *DeBerry*, *supra*, 487 F.2d at 452; *United States* v. *Alberti*, *supra*, 470 F.2d at 881-82. Where, as here, no prejudice or conflict was ever apparent a hearing was not required.

However, even though a hearing was not required in this case, since neither prejudice nor a conflict ever manifested itself, the trial judge, at the request of the Government and out of an abundance of caution, interrogated defense counsel as well as the defendants concerning any possible conflict and the defendants' concurrence in joint representation. The judge, who had during the course of the trial witnessed neither a conflict nor prejudice, clearly was obliged to delve no further into the issue of joint representation when the defendants categorically advised him in the robing room that they had discussed the issue of a conflict with defense counsel, determined there was no conflict, and agreed to joint representation. (Tr. 309-10). In that circumstance, further questioning of the defendants could only have impinged on their constitutional right to retain counsel of their own choice. See *United States* v. *Wisniewski*, *supra*, 478 F.2d at 285; *United States* v. *Sheiner*, *supra*,

410 F.2d at 342; *cf. Faretta* v. *California*, 43 U.S.L.W. 5004 (U.S. June 30, 1975). Moreover, the trial court properly gave weight to the attorney's representation that he saw no conflict. *United States* v. *Wisniewski*, *supra; United States* v. *Armone*, *supra*, 363 F.2d at 406; *United States* v. *Horne*, 423 F.2d 630, 631 (9th Cir. 1970).* For it should not be assumed that an attorney, particularly one as experienced and as able as defense counsel in this case (see Tr. 395 and Tr. of May 6, 1975 Sentencing at 9), would act contrary to the Code of Professional Responsibility. See *United States* v. *Wisniewski*, *supra.***.

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* In *United States* v. *DeBerry*, *supra*, 487 F.2d at 453, this Court held that an inquiry of defense counsel as to the existence of a conflict was not a sufficient basis on which the District Court could rely in that case in finding no conflict. But unlike *DeBerry*, here the defendants themselves were also interrogated and the District Court had not itself been a witness to a conflict during the course of the trial.

** If this Court should conclude that some inquiry into the question of prejudice or conflict was required, the District Court's inquiry of both *defense counsel* and *the defendants* was surely adequate under the circumstances of this case. The nature of a trial judge's inquiry into a matter such as this should be expected to depend on the degree to which prejudice or a conflict becomes apparent during the course of a trial. Here, where there was no evidence of prejudice or a conflict, the trial judge's inquiries were more than sufficient. In that circumstance, the burden of demonstrating a lack of prejudice as a result of joint representation has not been shifted to the Government, see *United States* v. *DeBerry*, *supra*, 487 F.2d 453-54 & n.6, though even if it had been, we submit the burden has been fully borne.

Finally, if the Court should find that the District Court's inquiry into the joint representation below was not sufficiently thorough, we suggest that a remand for a further hearing, rather than reversal, is the proper course. *Morgan* v. *United States*, *supra*, 396 F.2d 110. To be sure, the majority in *DeBerry* believed such an inquiry, delayed until after trial, came too late, but

[Footnote continued on following page]

## POINT II

### Appellants Have Not Demonstrated A Deprivation of Their Constitutional Right to Call Witnesses.

Lynch and McNally argue that their constitutional right to call witnesses was violated when their attorney indicated to the trial court that the defense had considered calling additional witnesses but decided not to call them and the trial court then failed to inquire of the defendants (i) whether they had been consulted about not calling these witnesses and (ii) whether they agreed that the witnesses should not be called. The appellants not only seek to impose a novel and affirmative duty on District Judges to inquire into the bases of defense decisions not to call witnesses, they also offer not the slightest indication that they were not participants in this decision, that counsel acted contrary to their wishes, or that, as a result, they suffered prejudice.

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we respectfully submit that there is substantial wisdom in Judge Moore's observation in dissent in *DeBerry* that a hearing of this sort, conducted before trial, would require a virtual preliminary trial and could well prejudice the defendants in other ways. Indeed, the particular dangers of joint representation may not even be perceptible until, at the earliest, the proof begins to come in before the jury. Here the impediments properly perceived by Judge Moore no longer exist. The trial record establishes concretely whatever potential for conflict may have arisen, and the defendants and counsel below made clear that the question of conflict had been fully ventilated among them. The likelihood that defense counsel apprised both defendants before trial, as only he then could, of any potential conflicts within the concrete terrain of the case to be tried and the defense to be presented strongly supports the view that, whether or not Judge MacMahon's inquiry was in any way inadequate, the defendants knew of any potential conflict of interest and the remedies available and had preferred to leave things as they were. To reverse their conviction merely because a clearer record on the point might have been made is hardly a necessary adjunct of their Sixth Amendment rights.

On the last day of trial and after McNally and other defense witnesses had taken the stand, defense counsel advised the District Court that the defense had cancelled out on a number of witnesses and was waiting only for one, a police officer who was under subpoena, to appear. The defense was granted a continuance to await the arrival of the subpoenaed witness, but he did not appear, and the defense rested. (Tr. 307, 310). Except for the reference to the police officer, the record is entirely silent concerning the identity of the witnesses the defense decided not to present. The record is equally silent concerning the nature of the testimony those witnesses might have provided.

Lynch and McNally argue that the constitutional right to call witnesses in one's behalf, *Chambers* v. *Mississippi*, 410 U.S. 284, 294 (1973); *Washington* v. *Texas*, 388 U.S. 14, 19 (1967); *In re Oliver*, 333 U.S. 257, 273 (1948), implies an affirmative duty of the trial court to determine whether a defendant concurs in his attorney's decision not to call witnesses. Thus, as appellants would have it, every time the defense fails to call witnesses, or the defendant chooses not to take the stand, the Court must, at the risk of automatic reversal, inquire whether the defendant knowingly and willingly has waived his right to present testimony. Appellants cite no authority to support this remarkable contention.* Moreover, ap-

* Indeed, *United States* v. *Calabro*, 467 F.2d 973 (2d Cir.), *cert. denied*, 410 U.S. 926 (1973), cited in appellants' brief, supports an opposite conclusion. *Calabro* cited with approval the ABA Standards Relating to the Prosecution Function and the Defense Function, The Defense Function § 5.2 (Approved Draft 1971). That Section provides that the final decision whether or not to call witnesses, other than the defendant, is for the *attorney* to make after consultation with his client, not for the client. If this decision is ultimately the attorney's, there would be little point

[Footnote continued on following page]

pellants have not claimed either that defense counsel failed to consult them about the decision, that they disagreed with the decision, or that these witnesses, whoever they might be, would have aided their defense.

What Lynch and McNally do offer this Court are their surmises that, had these uncalled and unidentified witnesses testified, they *might* have testified about and supported McNally's alibi defense. But the essence of appellants' claim then becomes a deprivation of Sixth Amendment rights on the grounds of incompetence of counsel, an assertion that Lynch and McNally do not make and could not make on this record. *United States* v. *Yanishefsky*, 500 F.2d 1227, 1333 (2d Cir. 1974). There is not one iota of support in the record or elsewhere * for the conclusion that these potential witnesses would have exonerated Lynch or McNally, that their attorney knew this, and that he nonetheless failed to call them. See *United States ex rel. King* v. *Schubin*, slip op. 1, at 3 (2d Cir., Sept. 2, 1975); *United States* v. *Yanishefsky*, *supra*, 500 F.2d at 1332; *United States ex rel. Testamark* v. *Vincent*, 496 F.2d 641, 643 (2d Cir. 1974), *cert. denied*, 95 S. Ct. 1685 (1975); *Vess* v. *Peyton*, 352 F.2d 325 (4th Cir. 1965), *cert. denied*, 383 U.S. 953 (1966).

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in having the trial judge obtain an express waiver from the defendant when it becomes apparent that the defense will not call witnesses. See *United States* v. *Yanishefsky*, 500 F.2d 1327, 1331-32 (2d Cir. 1974).

In this regard, it has long been acknowledged that attorneys have the power to waive constitutional claims for their clients when making decisions involving trial strategy. See *Faretta* v. *California*, *supra*, 43 U.S.L.W. at 5008; *Brookhart* v. *Janis*, 384 U.S. 1, 7-8 (1966); *Henry* v. *Mississippi*, 379 U.S. 443, 451 (1965).

* This Circuit recommends that affidavits of attorneys or defendants be filed in support of claims of ineffective assistance of counsel. *United States* v. *Wisniewski*, *supra*, 478 F.2d at 284-85, and case cited therein.

## POINT III

### There Was No Error In the District Judge's Charge On the Issue of Identification.

Lynch and McNally contend that the District Court erred in not using a model instruction on identification set forth in a Fourth Circuit decision, *United States* v. *Holley*, 502 F.2d 273, 277-78 (4th Cir. 1974), and more particularly that the court erred in not instructing the jury that the Government's burden of proof included the burden of showing beyond a reasonable doubt the identity of the defendant as the perpetrator of the crime. This claim is utterly frivolous.

At no time did the defense request the Fourth Circuit charge (See Tr. 306), and there were no exceptions to the District Judge's charge. (Tr. 390). In that circumstance, the failure to give this particular charge could only be complained of if it were plain error. See *United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965) (*en banc*), *cert. denied*, 383 U.S. 907 (1966); Fed. R. Crim. P. 30, 52(b). But the trial judge's charge on identification made perfectly clear to the jury the significance of this issue and the Government's burden of proof on the question of identity. A few quotes from the charge should suffice to demonstrate the thoroughness with which the jury was instructed on this issue and the utter lack of substantiality of appellants' contrary assertions:

> "Now, McNally's testimony sets up what is known as a defense of alibi. *Now here you must keep carefully in mind that neither the defendant McNally nor the defendant Lynch has any burden of proof to sustain in this case, and you cannot convict either of them unless the government proves beyond a reasonable doubt that the defen-*

*dant whom you are considering was present at the time and place where the alleged crime was committed and that it was that defendant who commited that crime.*

*Now, if after considering all of the evidence you have a reasonable doubt whether the defendant you are considering was present at the time and place of the alleged events, you must find that defendant not guilty.*

So, was Lynch the man who climbed into the truck and was McNally in fact the driver of the yellow Cadillac? In other words, were these defendants the two men who hijacked the truck on June 26, 1974? The key question for you to decide on Count 3 was whether Lynch was the man who climbed onto the truck and whether McNally was in fact the driver of the red Chevy Nova. Again, whether these defendants were the two men who hijacked the truck, a different truck on September 6, 1974?" (Tr. 377-78).

* * * * *

"The reliability of an identification by an eyewitness obviously depends upon all of the surrounding circumstances. You should look into the relationships of the witnesses and the person he was observing at the time of the observation. Did the witness know the person committing the criminal act or were they strangers at that time? Was the witness a victim of the crime or was he a mere bystander? Was the attention of the witness at the time of the viewing focused on the gunman and the driver of the Cadillac or was the witness preoccupied or distracted?

You should also consider the opportunity of the witness to observe the hijackers during and

after the incident in determining the reliability of the witness' identification. You should therefore consider all of the circumstances shown in the evidence which bear on the ability, opportunity and motivation of the witness to make a careful observation and to form and retain a definite image of the hijackers in his mind.

You should thus consider such factors as the condition of the witness' eyesight, his range of vision, the lighting conditions, whether or not his view was clear or obstructed, the age of the witness, his mental faculties and his emotional state at the time of his observation.

You should also consider the length of time that the witness was able to observe the hijackers, the distance between the hijackers and the witness at the time of the observation, any distinctive physical characteristics, facial expressions, mannerisms of the hijackers and their attire and his description, if any, or lack of it, of their general appearance." (Tr. 378-79).

* * * * *

"Now, you should consider all of the circumstances surrounding these pretrial identification procedures in order to determine the reliability of the witnesses (sic) in court identification of these defendants as the hijackers or the lack of their in court identification of these defendants as hijackers.

Thus, as to the photographic and line-up identification procedures some of the factors which you should consider are the lapse of time between the witnesses' initial observation of the hijackers at the scene of the crime, and the time when he viewed the photographs in the line-up.

You should consider the duration of the viewing session; the witness' physical and emotional state at those times; the identity and number of persons attending the viewing sessions with the witness; whether the witness was giving his own retained image or whether it was something he garnered from talking with others; the number of photographs shown to the witness, and whether the defendant's picture was among them; the number of persons in the line-up and whether they were all of a similar age, weight, height, coloring, race, dress and overall general appearance; whether the witness was able to identify the defendants as the hijackers at the time he viewed the pictures and lineups, and if so, whether the witness' identifications were quick and certain or hesistant and uncertain; whether the witness was able to identify the defendants as the hijackers at the times prior to the viewing sessions or whether any description which the witness gave before viewing any photographs or line-up matched the actual appearance of the defendant; the circumstances of the witness' in-court identification of the defendants as the hijackers may also be considered by you in determining the reliability of the witness' identification.

Here you should consider the lapse of time between the initial observation of the hijackers by the witness at the scene of the crime and this trial and his intervening observations of them from photographs or line-ups.

You should also consider the fact that the witness is observing these defendants at counsel table at this trial. The testimony of the witnesses on direct and cross-examination as to the basis for his identification. (sic) You should consider whether the witness was able to identify the de-

fendants on a previous occasion or whether he made a misidentification on a previous occasion." (Tr. 382-83).

While whether a trial judge in this Circuit need specifically instruct the jury on evaluating eye-witness identification testimony still appears to be an open question, *compare United States* v. *Fernandez*, 456 F.2d 638, 643-644 (2d Cir. 1972), *with United States* v. *Evans*, 484 F.2d 1178, 1187-1188 (2d Cir. 1973), Judge MacMahon's charge on the subject was clearly exhaustive and more than fair to the defendants. *United States* v. *Reid*, 517 F.2d 953, 967 n.17 (2d Cir. 1975).

## CONCLUSION

**The judgments of conviction should be affirmed.**

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK )
) ss.:
COUNTY OF NEW YORK)

Lawrence B. Pedowitz, being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 20 day of October, 1977 he served 2 copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

Arnold E. Wallach
253 Broadway
N.Y., NY

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Lawrence B Pedowitz

Sworn to before me this
20 day of October 1977

Gloria Calabrese

GLORIA CALABRESE
Notary Public, State of New York
No. 24-0535340
Qualified in Kings County
Commission Expires March 30, 1977